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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

**No. 730**

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
*Petitioner,*

*against*

CORPORATION AND SECURITIES COMMISSION,
*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of February 17, 1964 denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan in the above-entitled case as prayed for in the petition dated January 7, 1964, herein.

### Reasons for Granting Rehearing and Issuing the Writ.

1. To impose a substantial tax for the privilege of doing local business in Michigan would deprive Petitioner of its property without due process of law in violation of the Fourteenth Amendment, where Petitioner is engaged solely in interstate commerce and has left unexercised its privilege to engage in local business.

The court below has explicitly held that the Michigan statute here in question, Section 4 of P. A. 1921, No. 85 as

amended (Petition,* App. C, pp. 43-45), imposes a fee for the privilege of exercising a local franchise (Petition, App. A, p. 34) and that this fee may be imposed even where, as in this case, a foreign corporation engaged solely in interstate commerce has in fact not exercised its privilege to do local business (id. p. 31). While denying that Michigan seeks to tax the privilege of doing interstate business in Michigan (id. pp. 30-31), the court below nevertheless has asserted that its tax on the unexercised local franchise may be measured by the amount of capital and surplus which is devoted to interstate commerce and which is *not* devoted to the exercise of the local franchise. The court below stated:

> "What Michigan says to the taxpayer, in effect, is this: 'Separate and apart from your unquestioned right to exercise your corporate franchises in interstate commerce within this State, without imposition by this State of a fee for the exercise of that right, you may also pursue your business within this State, in matters not involving interstate commerce, but only upon payment of a fee for that privilege. That fee will be measured by determination of that portion of your total paid-up capital and surplus *available* for such intrastate business, *whether or not the privilege actually is exercised by you*'." (id. pp. 38-39) (emphasis added).

Petitioner respectfully disagrees with the Michigan court and has argued in its petition for certiorari that the Michigan franchise fee is in fact a tax on interstate commerce and invalid under the commerce clause. We submit, however, that if Michigan has saved its statute from invalidity under the commerce clause by characterizing it as a fee for a local franchise, then Michigan has imposed

* Citations are to Wisconsin & Michigan Steamship Company's petition for certiorari, dated January 7, 1964.

a substantial exaction which is so unfair and so out of proportion to benefits conferred by Michigan as to deprive Petitioner of its property without due process of law. The vice of this tax is not just that it taxes an unexercised privilege but moreover that this tax is a substantial one measured entirely by capital and surplus devoted to an activity—interstate commerce—which Michigan's highest court even now states to be beyond the State's power to tax.

This Court has often reaffirmed that a tax violates the due process clause unless it is reasonably related to benefits conferred or to protection afforded by the State. In *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905) this Court restricted the reach of a state tax under the due process clause stating at p. 202:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, * * *."

See also *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940); *Northwest Airlines v. Minnesota*, 322 U. S. 292, 294 (1944); *Morton Salt Co. v. City of South Hutchinson*, 159 F. 2d 897, 901 (10th Cir. 1947). The requirement of a reasonable relationship between the tax imposed and benefits conferred by the State is particularly significant where, as here, the tax has been attacked as an undue burden on interstate commerce. Cf.: *Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 544 (1950); *Ingels v. Morf*, 300 U. S. 290, 294 (1937).

We submit that in granting a privilege to engage in local business Michigan has conferred no benefits and no

protection for which it may impose a substantial tax, as long as that privilege is a dormant one, unexercised by the foreign corporation. Petitioner does not dispute the validity of the nominal $10 annual minimum fee or the $2 filing fee, bearing a reasonable relationship to administrative burdens assumed by the State, but a substantial tax based on assets devoted to purely interstate commerce, and not found to be within the State, is so grossly unfair as to deprive Petitioner of due process.

The Court has also made clear that a state may not, consistently with due process, impose a tax where the subject matter of the tax is beyond the state's tax jurisdiction. See e.g. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 210 (1930). This rule, furthermore, is applied by this court to franchise fees. The situation before this Court in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 (1910), was in many respects very similar to the case at bar. In that case Kansas had sought to impose a tax on the capital assets of a corporation as a condition for its doing a purely local business within the State. In invalidating this statute as inconsistent with the due process clause this court stated, at p. 38:

> "We need not stop to discuss at length the specific question whether the state can * * * make the property of the company, outside of Kansas, contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury * * * a given per cent of all its capital stock as a condition of its doing local business in Kansas. It is firmly established, that consistently with the due process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits."

Similarly in *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77, 82 (1938), this Court made clear that a state may not impose a franchise fee on a transaction for which no privilege or license from the state is needed. This Court has cautioned moreover that the value of the subject matter on which the tax is imposed must be determined with fair accuracy, for this Court stated in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218 (1925):

> "[D]etermination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid on a foreign corporation on account of interstate transactions.
>
> "The local business of a foreign corporation may support an excise measured in any reasonable way if neither interstate commerce nor property beyond the State is taxed."

In *Alpha Portland Cement Co., supra*, the tax sought to be imposed was in many ways similar to the one here in issue. It required the Cement Company, a foreign corporation, to pay $5 per $1,000 of "corporate excess" employed by it within Massachusetts. The Company did have a small amount of property in Massachusetts, but the tax was imposed on its entire corporate excess apportioned in accordance with income earned there by virtue of interstate commerce activity in Massachusetts. This court sustained the Cement Company's attack, based in part on the Fourteenth Amendment, pointing out that the tax, even as allocated, did not measure the value of assets used within the State.

Similarly in *Wallace* v. *Hines*, 253 U. S. 66 (1920), this court invalidated an apportioned franchise tax, stating at p. 69:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore *no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and tangible way that it adds to the value of the road and the rights exercised in the State.* Hence the possession of bonds secured by mortgage of lands in other States, or of a land grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State." (Emphasis added).

It is clear that the statement in the court below that the value of the local franchise may be measured by assets "available" for use within the State under the local franchise, even if not so used, simply does not stand up under these past holdings of this Court. If the decision below is left undisturbed, we submit that every foreign corporation having substantial assets outside the State, but which could be used in activity under the local franchise, will be at the mercy of the taxing power of the State. If ever the "heel of the system" has been exposed to the "mortal dart", we submit that it has been so exposed here.

Under the rule stated by this Court in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 599 (1954), Petitioner's argument that

the Michigan tax is invalid under the due process clause was timely raised and preserved for review by this court. Although it did not explicitly frame its argument below as one arising under the due process clause, Petitioner sufficiently preserved this argument by stating at pp. 48-49 of its brief below:

> "Obviously the fee as computed by the Commission bears no reasonable relation to the privilege granted by the State, that of doing business in Michigan as a corporation."

This argument was just as explicitly rejected by the court below (Petition, Appx. A, p. 31).

2. The decision of the Michigan Supreme Court will directly affect many other foreign corporations similarly situated and will adversely affect a large segment of interstate commerce.

The court below has clearly held that Michigan can impose the annual franchise fee on the privilege of doing a local business and measure that fee by the corporate assets "available" for use in such local business, regardless of whether any local business is actually conducted under the franchise. This decision bears most heavily, of course, on corporations such as Petitioner which do an extensive interstate business within Michigan and have not exercised their local franchises. However, this decision will also affect corporations which do exercise privileges granted by their local franchises, because the measure of the fee under this decision has no relationship to the magnitude of the local activity (Id. p. 31).

There are now pending numerous cases before the Michigan Board of Corporate Tax Appeals, and there are other cases before Respondent herein, growing out of

franchise fee assessments for years going back as far as 1955 which will be affected by the ultimate disposition of the case at bar. Several cases involving water carriers holding Michigan franchises are listed in Appendix A to this petition.

It should not be necessary to point out to this Court the impact that the State court's construction of Michigan's annual franchise tax will have on interstate commerce. Michigan has the longest inland coastline of any state in the country and the greatest concentration of industrial wealth in the world. Having extensive coastlines on four of the five Great Lakes, it sits astride one of the principal inland waterways of the world. Clearly a state tax, even if designated a tax on the privilege of exercising a purely local franchise, which burdens interstate commerce, as argued in the petition for certiorari, will necessarily have an effect on the use of this great natural waterway.

The due process issue raised by Michigan's imposing a tax on an unexercised local franchise measured by assets used for purely interstate activity continues to be raised before this Court. Indeed there is presently pending before this Court another case raising a similar issue. *American Oil Company* v. *Neill* (Docket No. 701). The decision of the Supreme Court of Idaho, for which review is sought, had held that one of the factors giving the state a sufficient nexus to the transaction taxed was the existence of a dealer's permit authorizing the oil company to enter into the Idaho market as a distributor of motor fuels. 383 P. 2d 350, 360 (Idaho, 1963).

We submit that the Supreme Court of Michigan has decided an important question of federal law in a way which is not in line with the previous decisions of this court and in a way which will adversely affect an important segment of interstate commerce.

## Conclusion.

For the reasons set forth above and in the petition for a writ of certiorari it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Supreme Court of the State of Michigan.

Respectfully submitted,

HERBERT BROWNELL,
Counsel for Petitioner.

March 12, 1964.

Of Counsel:

WENDELL DAVIS, JR.
SPARKMAN D. FOSTER
JOHN MUNDELL, JR.

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

HERBERT BROWNELL,
Counsel for Petitioner.

# APPENDIX A.

| Taxpayer | State of Inc. | Years In Issue | Pending Before | Docket No. |
|---|---|---|---|---|
| Rockport S.S. Co. | Delaware | 1955–1962 | Comm.* | |
| Red Arrow S.S. Co. | Delaware | 1955, 1956 | Comm. | |
| | | 1957–1959 | BTA** | 60–4 |
| | | 1960–1962 | Comm. | |
| Reiss S.S. Co. | Delaware | 1955, 1956 | BTA | 60–5 |
| | | 1957–1959 | BTA | 60–9 |
| | | 1960–1962 | Comm. | |
| Wilson Marine Transit Co. | Delaware | 1957, 1959–1961 | BTA | 62–2 |
| Redland S.S. Co. | Delaware | 1958, 1959 | BTA | 60–12 |
| | | 1960, 1961 | BTA | 62–3 |
| Tomlinson Fleet Corp. | Delaware | 1956–1959 | BTA | 60–11 |
| Oglebay Norton Co. | Delaware | 1957 | BTA | 62–1 |
| Gartland S.S. Co. | Delaware | 1958–1963 | Comm. | |
| Brown S.S. Co. | New York | 1954–1958, | BTA | 61–4 |
| | | 1959–1962 | Comm. | |
| American S.S. Co. | New York | 1954–1959 | Comm. | |
| | | 1960–1962 | Comm. | |
| Amersand S.S. Co. | Delaware | 1954–1959 | Comm. | |
| | | 1960–1962 | Comm. | |

* Corporation and Securities Commission

** Michigan Board of Tax Appeals